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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re THE BILLING RESOURCE, dba Integretel, a California corporation, Debtor. [Taxpayer's Identification No. 33-0289863]	Case No. 07-52890-ASW [Chapter 11]
THE BILLING RESOURCE, dba INTEGRETAL, a California corporation, Plaintiff, vs. FEDERAL TRADE COMMISSION, and DAVID R. CHASE, not individually, but solely in his capacity as receiver for Nationwide Connections, Inc., Access One Communications, Inc., Network One Services, Inc., 411TXT, Inc., CELL-INFO-USA, INC., Enhanced Billing Services, Inc., Toll Free Connect, Inc., Cripple Creek Holdings, LLC, Built to Last, LLC, Not Fade Away, LLC, He's Gone, LLC, The Other	Adv. No. 07-05156 **FEDERAL RECEIVER'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES** Date: October 17, 2007 Time: 2:00 p.m. Ctrm: 3020

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Defendants.

TO THE HONORABLE ARTHUR S. WEISSBRODT, UNITED STATES BANKRUPTCY JUDGE:

David R. Chase, the United States District Court-Appointed Receiver (the "Federal Receiver") of Access One Communications, Inc. ("Access One"), and Network One Services, Inc. ("Network One") (collectively, the "Receiverships"), hereby submits his Opposition to the Motion for Preliminary Injunction ("Supplemental Opposition") filed on or about October 11, 2007 by The Billing Resource, dba Integretel, a California corporation (the "Debtor"), as follows:[1]

I.

INTRODUCTION

The Debtor is asking this Court to restrain an agent of the District Court from performing his duties to and imposed by the District Court of the Southern District of Florida (the "District Court"). This request is a direct attack on the integrity of the District Court's Orders and authority, which the District Court has made clear beyond argument that the terms of those Orders were meant to protect. It sets up a conflict between the orders of this Court and the District Court and it

[1] The Receiver incorporates herein by reference each of the following pleadings the Receiver filed with this Court in opposition to the Debtor's Motion for Use of Cash Collateral, including: 1) Opposition to the Motions of The Billing Resource, dba Integretal, a California corporation For Use of Cash Collateral and Granting Replacement Liens; For an Order Authorizing Use of Existing Bank Accounts and Cash Management Systems and the Ex Parte Application For Order Approving Ken Dawson as Debtor's Designated Responsible Individual; Memorandum of Points and Authorities (the "First Opposition"); 2) Declaration of David R. Chase filed in support of the First Opposition; 3) Federal Receiver's Supplemental Opposition to Motion for Authority to Use Cash Collateral With Memorandum of Points and Authorities; 4) Federal Receiver's Second Supplemental Opposition to Motion for Authority to Use Cash Collateral; Memorandum of Points and Authorities; and 5) the First, Second, Third and Fourth Requests for Judicial Notice of David R. Chase, Federal Receiver in Opposition to Motion for Authority to Use Cash Collateral.

assumes jurisdiction that does not exist. In the meantime, Debtor proceeds to litigate the issues decided by the Orders on two fronts -- in the 11th Circuit and before this Court.

This request should be denied. Initially, and critically, this action may be maintained because Debtor has not obtained permission from the District Court to bring any action against the Federal Receiver. For over 100 years, Federal law has required that before an action is brought against a receiver, the litigant must obtain leave from the appointing court. This has not been done here.

Moreover, there is no reason to enjoin the Federal Receiver, and no purpose will be served except to set up a conflict between orders of this Court and the District Order. The Debtor is subject to two standing Orders holding that the Subject Funds are the property of the Federal Receiver, holding that the Subject Funds are not property of the Debtor or property of the bankruptcy estate, and requiring that the Debtor turn them over or show cause why it should not be held in contempt. Enjoining the Federal Receiver does not extinguish the effect or compulsion of the Orders. Nor does this Court sit in review of those Orders. Instead, the requested relief puts the Federal Receiver in the position where he is directed by an order of the District Court to take certain actions and enjoined by the Court from obeying that order, and it sets up a conflict between this Court and the District Court. The Federal Receiver is not another run of the mill litigant but, instead, an agent of the District Court, who, even if restrained from going forward, will still have to report to the District Court as to what is happening in respect of a standing Order requiring the Debtor and its principals to turn over the receivership property or face possible incarceration. What this Court is really being asked is to restrain the District Court Proceedings, which means restrain the District Court in exercise of its exclusive jurisdiction over receivership property. And not even Debtor suggests the District Court Proceedings may be restrained.

Nor has Debtor made any showing upon which such injunction may be based. The District Court Proceedings are not subject to the automatic stay, even Debtor admits this, and there are no significant proceedings by the Federal Receiver, pending or threatened, the expense of which endangers the hypothetical reorganization here. As the Court recalls, there are two proceedings in Florida, that litigated by the FTC (the "FTC Proceeding"), and the contempt proceeding involving

the Federal Receiver (the "Contempt Proceeding"). The FTC Proceeding is the proceeding in which discovery must be taken, pre-trial proceedings attended to, and trial conducted, and of which Debtor complains. The Federal Receiver is not a participant in this proceeding.

The Debtor, however, has only addressed the expense of the FTC Proceeding. There is no evidence before this Court of any expense that the Debtor will incur in the little that remains in respect of the Contempt Proceeding, and, as discussed above, enjoining the Federal Receiver will not make the contempt proceeding go away. The District Court Orders still stand and Debtor will have to incur the expenses of complying or showing cause, in any event.

Nor does Debtor's 'budget" support the claims here. Instead, it demonstrates that even if its claim had merit, the consequences complained of will not become manifest, if at all, until the passage of at least two months, which is more than double the period presently requested for authority to use Cash Collateral. Debtor has made no attempt to supply any foundation for its asserted figures, and the figures raise more questions than they answer. They certainly do not demonstrate that the acts of the Federal Receiver, sought to be restrained, will impede Debtor's vague, unspecified, and largely speculative plan to reorganize.

Debtor continues to assert that the Federal Receiver is merely an unsecured creditor. However, as set forth in the Federal Receiver's Second Supplemental Reply to Debtor's Cash Collateral Motion, that issue was argued by the Debtor before the District Court and it was rejected. Instead, as between the Federal Receiver and the Debtor, the ownership of the Funds has been decided by the District Court Orders.

Finally, the Debtor attempts to cloud the clear and unambiguous Orders of the District Court by treating the Federal Receiver's claim as an equitable "trust" and thereby imposing a "tracing" requirement. The Federal Receiver's equitable remedy was imposed by the District Court acting pursuant to Federal Statute, which remedy is far broader than any state law equitable trust claim. The District Court has already considered and rejected the Debtor's argument that the commingling of deposits renders the District Court's Orders ineffective as to the Debtor. To the extent that the Debtor disagrees with the District Court, it can attempt to convince the Eleventh

Circuit that the District Court was in error. Nonetheless, the Debtor holds property of the Receivership, which is excluded from the estate.

II.

DEBTOR FAILED TO OBTAIN PERMISSION FROM THE DISTRICT COURT TO SUE THE FEDERAL RECEIVER

As discussed in the Federal Receiver's oppositions to the Debtor's Cash Collateral Motion as well as in the FTC's oppositions, the District Court has exclusive jurisdiction over the Subject Funds, and that jurisdiction is conferred by both statutory and judicial authority (28 U.S.C. § 754, 1962; SEC v. Wolfson, 309 B.R. 612 (Bankr.D.Utah 2004). However, there is also a fundamental lack of subject matter jurisdiction over this action related to this exclusive District Court jurisdiction. The Debtor has not obtained permission from the District Court to bring this action or any action against the Federal Receiver. Whether Debtor's failure to do so and disclose this to the Court is a result of the inadvertence or what the Federal Receiver believes is a pattern of selective disclosure, it has been Federal law for over 100 years that before litigant brings an action a receiver, it must obtain permission from the court that appointed that receiver. As explained and held by the 11th Circuit in Carter v. Rogers, 220 F.3d 1249, 1252 (11th Cir. 2000).

> "An unbroken line of cases ... has imposed [this] requirement as a matter of federal common law." Linton, 136 F.3d at 545. In so holding, these circuit courts have applied the rule referred to as the "***Barton*** doctrine." *See id.* The Supreme Court in Barton v. Barbour, 104 U.S. 126, 127, 26 L.Ed. 672 (1881), stated that "**[i]t is a general rule that before suit is brought against a receiver[,] leave of the court by which he was appointed must be obtained.**"

It remains unquestioned that this doctrine applies to federal receivers. Judicial authority has extended its reach to require the same in respect of trustees. So pervasive is this doctrine that the 11th Circuit and other Circuits have held that leave must be obtained from the bankruptcy court before suing a bankruptcy trustee in district court.

> "Joining the other circuits that have considered this issue, we hold that a debtor must obtain leave of the bankruptcy court before initiating an action in district court when that action is against the trustee or other bankruptcy-court-appointed officer, [FN4] for acts done in the actor's official capacity. See Springer v. Infinity Group Co., No. 98-5182, 189 F.3d 478 (10th Cir. Aug.26, 1999) (unpublished table decision), cert. denied, 529 U.S. 1020, 120 S.Ct. 1422, 146 L.Ed.2d 314 (2000); Gordon v. Nick, No. 96-1858, 162 F.3d 1155 (4th Cir. Sept.2, 1998) (unpublished table decision); In re Linton, 136 F.3d 544, 546 (7th Cir.1998); In re Lehal Realty Assocs.Lebovits v. Scheffel (), 101 F.3d 272 (2d Cir.1996); Allard v. Weitzman In re DeLorean Motor Co. (), 991 F.2d 1236, 1240 (6th Cir.1993); Vass v. Conron Bros. Co., 59 F.2d 969, 970 (2d Cir.1932); Kashani v. Fulton (In re Kashani), 190 B.R. 875, 885 (9th Cir.BAP 1995)."
>
> Id.

Failure to obtain leave from the appointing court deprives the court in which the unauthorized action is brought of jurisdiction.

As demonstrated by Crown Vantage, Inc. v. Fort James Corporation, 421 F.3d 963 (9th Cir.2005), the 9th Circuit recognizes and applies the Barton Doctrine. In Crown Vantage, the 9th Circuit included the liquidating trustee in the scope of the Barton Doctrine and reversed the lower court's decision requiring the trustee to establish irreparable harm before obtaining injunctive relief itself based upon violation of the Barton Doctrine. The 9th Circuit explained the Barton Doctrine and its rationale and basis.

> "This holding is firmly grounded in the ***Barton*** doctrine, established by the Supreme Court over a century ago, which provides that, before suit can be brought against a court-appointed receiver, **"leave of the court by which he was appointed** must be obtained." **104 U.S. at 127**; *see also Davis v.*

Gray, 16 Wall. 203, 83 U.S. 203, 218, 21 L.Ed. 447 (1872) (holding that the court appointing a receiver 'will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without [the court's] consent'). The Court held that if leave of court were not obtained, then the other forum lacked subject matter jurisdiction over the suit. ***Barton*, 104 U.S. at 127**. Part of the rationale underlying ***Barton*** is that the court appointing the receiver has in rem subject matter jurisdiction over the receivership property. *Id.* at 136. As the Supreme Court explained, allowing the unauthorized suit to proceed "would have been a usurpation of the powers and duties which belonged exclusively to another court." *Id.*

Crown Vantage, supra, at 970.

Nor does it make a difference whether the action is brought in State court or Federal court.

"Carter argues that the Barton doctrine requires parties to obtain leave of the bankruptcy court only when they wish to pursue a state court remedy. We disagree, and hold that when leave is required, it is required before pursuing remedies in either state or other federal courts. We find no reason to distinguish between instances where the trustee is sued in state court and those in which the trustee is sued in federal court. SeeKashani v. Fulton (In re Kashani), 190 B.R. 875, 885 (9th Cir. BAP 1995) ("[L]eave to sue the trustee is required to sue in those federal courts other than the bankruptcy court which actually approves the trustee's appointment."); In re Krikava, 217 B.R. 275, 279 (Bankr.D.Neb.1998) ("Consent of the appointing bankruptcy court is required even when the plaintiff seeks to sue in another federal court.")."

Carter, supra, at 1253

This doctrine is not subject to waiver. As held in Crown Vantage, supra, at 970, the Barton Doctrine implicates subject matter jurisdiction and, consequently, is not waived and can be raised at any time.

III.

THE REQUESTED INJUNCTION WILL SERVE NO PURPOSE EXCEPT TO ESTABLISH A CONFLICT BETWEEN THE ORDERS OF THIS COURT AND THE DISTRICT COURT

Debtor is asking this Bankruptcy Court to enjoin an agent of the District Court from performing the duties imposed upon him by order of the District Court, in a proceeding that even Debtor admits is not subject to the automatic stay, in respect of property over which the District Court has exclusive in rem jurisdiction. Such a request, even if this Court grants it, will have little, if any, effect on the District Court Proceedings, it will expose the Federal Receiver to conflicting orders, and it will set up a conflict between the orders of this Court and the District Court.

The Receiver is not a typical litigant. The Receiver is a creature of Court Order, who operates as an agent of the District Court on behalf of the District Court. Indeed, the District Court's three Injunctive-Relief Orders make this clear:

> The Receiver shall be the agent of this Court, and solely the agent of this Court, in acting as Receiver under this Order. See, Temporary Restraining Order (Exhibit "B" to Chase Declaration) at Section VII; Preliminary Injunction (Exhibit "C" to Chase Declaration) at Section VIII; and Amended Preliminary Injunction (Exhibit "D" to Chase Declaration) at Section VIII).

As such, the Receiver is obligated both by the Orders appointing him and by case judicial authority to marshal and preserve the assets of the Receivership Entities in order to return these assets to the victims of the fraud. For example, in Eller Industries, 929 F. Supp. at 372 [CITE] the court stated:

> The Receiver is charged with the duty of managing the estate and property entrusted to his care. It must collect and preserve corporate property from imminent danger of loss, waste or dissipation and administer the receivership, free from outside interference with estate property.

The Receiver is also an agent and fiduciary of the court which appoints him. See id.; see also Temporary Restraining Order at Section VII; Preliminary Injunction at Section VIII; and Amended Preliminary Injunction at Section VIII.

In Eller Industries, involving a strikingly-similar situation, the court concluded that the Bankruptcy Court's injunction issued in Massachusetts could not be effective against the Receiver appointed by the Colorado District Court because the Bankruptcy Court's injunction interfered with the Court-mandated obligations of the Receiver, who was a fiduciary of the District Court and whose responsibilities, pursuant to the District Court's Order appointing him, was to locate and protect the assets of the receivership entities:

> The purposes of this Receivership, to marshal and protect company assets for the benefit of all creditors, can only be achieved by a stay of foreign equitable actions, including the Massachusetts Adversarial Proceeding as it purports to apply to the Receivership. 929 F. Supp. at 373. Similarly, in Citibank, N.A. v. Nyland, (CF8) Ltd., 839 F.2d 93 (2d Cir. 1987), the Second Circuit held:
>
> > As receiver, Cushman & Wakefield is acting as an officer of the court and has the duty to preserve and protect the property pending the outcome of the litigation. As a result, its authority is wholly determined by the order of the appointing court.
>
> Id. at 98 (citations omitted).

Indeed, in a Federal governmental enforcement action, a Federal District Court typically appoints a Receiver and issues a Temporary Restraining Order and/or Preliminary Injunction to preserve the assets resulting from the actions of the Receivership Entities, whether held by parties or non-parties, in order to provide redress for legitimately-defrauded investors. See FTC v. Productive Marketing, Inc., 136 F. Supp. 2d 1096, 1105-06 (C.D. Cal. 2001). In Productive Marketing, the District Court found that the non-party's failure to turn over receivership funds disrupted the District Court's power to enforce its Injunction and the Receiver's right to obtain such funds:

> If the court cannot compel ACCPC to turn over assets in its possession belonging to the receivership estate, the Receiver will be unable to provide adequate redress to consumers who have been defrauded by Defendants. Because ACCPC's conduct imperils

> the court's ability to render an effective judgment, the court may properly enjoin it, even though it is not a party to the action.

Id. at 1100-01,1106. In other words, the appointment of a Receiver is typically a necessary means by which a Federal agency seeks injunctive relief in an enforcement action, and thus the Receiver seeks to prevent the diversion and waste of receivership assets for the benefit of those who were defrauded. See SEC v. Bowler, 427 F.2d 190, 197-98 (4th Cir. 1970) (finding that Receiver was necessary in fraud enforcement action to locate and preserve assets of Receivership Entities for benefit of those defrauded).

The action pending before the District Court is an enforcement action in which the FTC is seeking injunctive relief against, among others, the Debtor for consumer redress for deceptive and unfair practices for unauthorized billing of charges on phone bills in violation of the Federal Trade Commission Act. As such, the District Court exercised its equitable powers and permanently appointed the Receiver. In the District Court's Amended Preliminary Injunction, which the FTC served on the Debtor, the District Court ordered the Receiver, as the District Court's agent, to locate, marshal and preserve Receivership property:

> The Receiver shall be the agent of this Court, and solely the agent of this Court, in acting as Receiver under this Order." (Exhibit "D" to Chase Declaration; page 11; emphasis added);
>
> [T]he Receiver is authorized and directed to accomplish the following: . . .
>
> B. Take exclusive custody, control, and possession of all assets and documents of, or in the possession, custody, or under the control of, the Receivership Defendants, wherever situated. (page 11; emphasis added);
>
> The Receiver shall assume control over the income and profits therefrom and all sums of money now or hereafter due or owing to the Receivership Defendants. (pages 11-12; emphasis added);
>
> [T]he Receiver is authorized and directed to accomplish the following: . . .
>
> D. Conserve, hold, and manage all assets of the Receivership Defendants, and perform all acts necessary or advisable to preserve the value of those assets in order to prevent any irreparable loss, damage, or injury to consumers or creditors of the Receivership Defendants, including, but not limited to, obtaining

an accounting of the assets and preventing unauthorized transfer, withdrawal, or misapplication of assets. (pages 11,13; emphasis added);

F. Prevent the inequitable distribution of assets and determine, adjust, and protect the interests of consumers and creditors who have transacted business with the Receivership Defendants. (pages 11, 13; emphasis added);

A. Immediately upon service of this Order upon them, or within such period as may be permitted by the Receiver, Defendants and any person or entity served with a copy of this Order shall transfer or deliver possession, custody, and control of the following to the Receiver:

1. All assets of the Receivership Defendants . . . . (page 17); and

[A]ll banks, broker-dealers, savings and loans, escrow agents, title companies, commodity trading companies, precious metals dealers and other financial institutions and depositories of any kind, and all third party billing agents, local exchange carriers, common carriers, and other telecommunications companies shall cooperate with all reasonable requests of the FTC and the Receiver relating to implementation of this Order, including transferring funds at the Receiver's direction and producing records related to the assets and sales of the Receivership Defendants. (page 18).

Should this Court enjoin the Receiver, who is an agent of the District Court obligated by Court Order to perform the above-referenced duties, this Court will be enjoining the Receiver from performing his Court-authorized duties and, therefore, will also be enjoining the District Court. Such a ruling by this Court would create an unworkable, unthinkable, and grave conflict between such Order and the previously-issued Orders from the District Court (including the Amended Preliminary Injunction, the Omnibus Order, and the Order Granting Motion for Clarification as to Scope of Stay).

IV.

THE DEBTOR HAS FAILED TO MAKE A SHOWING UPON WHICH INJUNCTIVE RELIEF CAN BE BASED.

This Court has twice warned Debtor that it has not presented sufficient evidence to warrant injunctive relief. The first warning was that the hearing on Debtor's Emergency Motion for Temporary Restraining Order. The second was at the continued hearing on Debtor's Motion for a

Temporary Restraining Order against the FTC. In fact, Debtor's failure to present sufficient evidence resulted in this Court's denying the TRO. Debtor now comes before this Court with no further evidence, in general, and no evidence whatsoever demonstrating the Federal Receiver should be restrained.

As this Court will recall, and as discussed above, there are two proceedings pending. The first is the FTC's action against Debtor and others (the "FTC Action"). This is the action in which Debtor complains it will incur significant attorney's fees. These, of course, include discovery, pre-trial proceedings, and trial.

However, the Federal Receiver is not a participant in the FTC Action. Instead, the proceedings involving the Federal Receiver are largely complete and the result of these proceedings are represented by the District Court Orders. These Orders are self executing and require Debtor to turn over the Subject Funds or show cause why the District Court should not hold it in contempt. Unless this Court restrains the District Court Proceedings or the District Court, neither of which even the Debtor has requested, the Debtor will still have to comply with the District Court Orders. It will incur no significant legal expenses, if any, because of prospective actions of the Federal Receiver, nor has it even claimed that it will.

Even if this Court were to conflate these two proceedings, the Debtor has made no further evidentiary showing than that on which this Court denied the Debtor's request for a TRO. Although it submits two spreadsheets claiming to be alternative budgets, it offers no evidentiary foundation from which this Court can determine whether the assertions therein are accurate or even credible. The Declaration of Ken Dawson (the "Dawson Declaration") doesn't speak to any reason why the Federal Receiver should be enjoined. The Declaration of Paul Weber (the "Weber Declaration") demonstrates that although he has reviewed and discussed these budgets with the Debtor, he did not prepare them nor does he have any personal knowledge as to their accuracy. In particular, no evidence before this Court supports Debtor's assertion that it will spend anywhere near the amounts set forth in its Exhibit "C" at those times. There is no discussion of the specific proceedings which are anticipated, there is no historical evidence, and the law firms involved are not even mentioned. As discussed above, Debtor does not even attempt to differentiate between

attorney's fees that will be necessitated and respect of the FTC Action and those that will be necessitated by proceedings brought by or on behalf of the Federal Receiver, no such proceedings even mentioned.

There are other problems with these spreadsheets. They assume that the Debtor will spend $1,000,000 in legal fees and still not obtain the Subject Funds. There is no line item for recovery of the Subject Funds. That being the case, the better resolution is to enjoin Debtor from expending those funds.

In addition, and critically, the spreadsheets assume that these Subject Funds are the property of the estate. That assumption is in direct conflict with two standing orders of the District Court finding that the funds are not property of the Debtor and not property of the Debtor's estate, but instead, property of the Federal Receiver. If this Court were to restrain the Federal Receiver, and in so doing allow the Debtor to spend the Subject Funds, it would be exercising control over property under which the District Court has exclusive in rem jurisdiction and it would be effectively determining the interests in the Subject Funds without a final order in an adversary proceeding in derogation of Federal Rules of Bankruptcy Procedure 7001(2).

There are other questions that should be considered here and are not demonstrated or discussed in Exhibit "C". As this Court is aware, the Debtor has bought some cooperation from certain creditors by promising pre-payment of a certain percentage of invoices. Obviously, this is not in the ordinary course of business, and it requires Court approval. Effectively, it amounts to factoring the customer's receivables, again, something outside the ordinary course of business. Since, as discussed below, Debtor's budgets demonstrate that it never is left without cash, the question arises as to whether the shortfall Debtor claims is a result of the unsubstantiated attorney's fees or the unusual and questionable pre-payment arrangement. Similarly, Debtor never explains the one time $600,000 drop in revenue in December which actually is the precipitating factor of the problems it claims.

Finally, Debtor's Exhibits, although lacking in any evidentiary value, are interesting for what they do show. The Debtor's worst case scenario, it will not experience any operating monthly shortfall until mid December. some two months from now. The Cash Collateral proposal presently

before this Court extends only to November 2, and, apparently, even the unsecured creditors are not sufficiently convinced with Debtor's "budget" to agree to a permanent cash collateral order. Finally, the budgets demonstrate that, Debtor never runs out of cash. Its ending total cash balance during the times where it claims it will have shortfalls never falls below $3,000,000. Debtor is not harmed by the Federal Receiver's proceeding, Debtor does not require the Subject Funds, and Debtor has presented no evidence on which the Federal Receiver may be enjoined.

V.

THE DEBTOR FAILS TO SATISFY ANY OF THE BASIC EVIDENTIARY REQUIREMENTS NECESSARY TO OBTAIN A PRELIMINARY INJUNCTION

Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.), ___ F.3d. ___, 2007 WL 2555941 *5 (9th Cir. 2007), cited by the Debtor, sets fourth the traditional four part test for deciding whether a preliminary injunction is appropriate. The moving party must show:

> (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Alternatively, a court may grant the injunction if the plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.

These two formulations "represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum." Speculative injury cannot be the basis for a finding of irreparable harm. Goldie's Bookstore, Inc. v. Superior Court, 739 F.2d 466, 472 (9th Cir.1984).

Here, the Debtor fails to satisfy any of the basic evidentiary requirements for a preliminary injunction. First, the Debtor's sole evidence in support of its likelihood of success of reorganization is that it has obtained the support of the Creditors' Committee to continue operations for a limited time while continuing to negotiate with interested parties concerning its future. This statement speaks nothing of the numerous objections filed by creditors who claim security interests in the

assets of the Debtor, of which the lack of support would be fatal. In addition, the Debtor's strategy over the near term presupposes that it will be able to use property of the Receiverships in order to fund operations, which in itself is fatal. Moreover, the Debtor fails to provide evidence of the likelihood of success on the merits with regard to its dispute with the FTC and the Receiver which it is seeking to enjoin, the latter of which has already been decided on the District Court level and is on appeal. Instead, the Debtor rehashes arguments that were already considered and rejected by the District Court.

With regard to irreparable injury, the Debtor's budget is purely speculative-- it assumes that it will spend $1 million in legal fees (without any evidence of how it arrived at that number) and will lose on the merits in its appeal as the basis of its showing that it will be unable to have the funds necessary to reorganize. In addition, the Debtor fails to address what other avenues might be available to fund near term operations other than to use the Receiver's money, such as post-petition financing. Finally, the Debtor fails to address the "public interest" fostered by the FTC action and the Receiverships and their mutual goal of redressing the wrongs of consumers. Neither the Debtor's Motion for a Preliminary Injunction or its Supplemental Memorandum provides any concrete evidence to support the fundamental requirements of a preliminary injunction.

VI.

THE DISTRICT COURT HAS JURISDICTION OVER THE SUBJECT FUNDS

The District Court has exclusive jurisdiction over the Subject Funds and, because it is conferred such jurisdiction by statute and judicial authority, it exercised that jurisdiction first, and it is the proper court to make and enforce orders in respect of that property. 28 U.S.C. §§ 754 and 962 confer on the District Court, exclusive jurisdiction over the Subject Funds. Judicial authority demonstrates that the findings expressed in the District Court's Clarification Order, were an appropriate exercise of the District Court's jurisdiction.

SEC v. Wolfson, 309 B.R. 612 (D. Utah 2004) is factually and conceptually identical to the matter herein. There, the SEC prosecuted a civil fraud action against a group of defendants who subsequently filed Chapter 11 Petitions. These defendants sought to dismiss the SEC's contempt motion, which, as here, had been brought to enforce previous District Court orders. In particular,

four hours before the District Court was to hear that contempt motion, the defendants filed their petitions. The SEC, nevertheless, proceeded with the motion, and defendants argued that further proceedings were barred by the automatic stay. After briefing, the District Court found that the automatic stay did not apply and it granted the SEC's motions, as here, by entering a contempt order expanding the receivership.

The District Court initially addressed jurisdiction. It found that it had jurisdiction to determine its jurisdiction and to decide whether the automatic stay is applicable to this litigation.

> "At the outset, the Court finds that it has jurisdiction to determine its own jurisdiction, as well as to decide whether the automatic stay is applicable to the instant litigation. See In re Baldwin-United Corp. Litig., 765 F.2d 343, 347 (2nd Cir.1985) ("The Court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the precise question whether the proceeding pending before it is subject to the automatic stay."); Securities & Exchange Comm'n v. Bilzerian, 131 F.Supp.2d 10, 13-14 (D.D.C.2001); Securities & Exchange Comm'n v. First Fin. Group of Tex., 645 F.2d 429, 437-40 (5th Cir.1981); cf. In re Pincombe, 256 B.R. 774, 781 (Bankr.N.D.Ill.2000) (stating that because the § 362(b)(4) exception takes effect immediately, a governmental agency is not required to seek relief from the stay before continuing proceedings against a debtor)."

Wolfson, supra, at 617.

The Wolfson Court went on to discuss the District Court's concurrent jurisdiction with the bankruptcy court to determine the effect of the bankruptcy proceeding and the status of property and held, "because the District Court's jurisdiction attached first in time, it was superior."

> "This Court has concurrent jurisdiction with the Bankruptcy Court to determine the effect of the bankruptcy proceeding on this case. See United States Dep't of Housing & Urban Dev't v. Cost Control Marketing & Sales Mgm't, 64 F.3d 920, 927 n. 11 (4th Cir.1995) (citing Brock v. Morysville Body Works, Inc. 829 F.2d 383 (3rd Cir.1987)), cert. denied,517 U.S. 1187, 116 S.Ct. 1673, 134 L.Ed.2d 777 (1996); see also In re Dolen, 265 B.R. 471, 476 (Bankr.M.D.Fla.2001) (noting that "[t]he district court has concurrent jurisdiction with the bankruptcy court to determine the extent to which the Section 362 automatic stay limits the actions of the Commission in its ability to pursue the pending district court action.") Further, as the Cost Control court noted, "because the district court's jurisdiction attached first in time, it was superior." Id.; see also United States v. Delta Distributors Co., Inc., 1996 WL 460112 (June 21, 1996 S.D.W.Va.) (finding that "because this Court's jurisdiction attached first in time, it is superior."). Similarly, in Klass v. Klass, the court determined that "[t]he clearly predominant rule is that jurisdiction is concurrent, and that the court in which the non-

> bankruptcy case is pending may determine the effect of the stay on that case." 377 Md. 13, 831 A.2d 1067, 1071 (App.2003) (citing numerous federal cases).

Wolfson, supra, at 617-618.

Judicial authority also holds that in a receivership, the District Court's jurisdiction is superior, even if the receivership proceedings and the District Court's exercise of its jurisdiction followed the bankruptcy. In Eller Industries, Inc. v. Indian Motorcycle Manufacturing, Inc. ("IMMI"), 929 F. Supp. 369 (D. Colo. 1995), the bankruptcy trustee sought and obtained a preliminary injunction precluding IMMI from soliciting funds by using a trademark which the trustee maintained was the exclusive property of the debtors. Shortly thereafter, IMMI was placed in a federal receivership and a receiver was appointed. The trustee maintained that the preliminary injunction was binding on the receivership and essentially placed the receivership assets in a "constructive trust" for the trustee's benefit. The district court disagreed, holding as follows:

> This Court has exclusive jurisdiction over the assets and administration of the Receivership imposed on IMMI. Equitable actions against the estate may be authorized only by this Court. An equitable action against IMMI in another forum, by definition, seeks to control assets of the Receivership Estate and thereby conflicts with this Court's exclusive jurisdiction over Receivership Estate assets. Absent leave of this Court, all equitable actions against IMMI cannot be effective against this Court or the Receiver.

Id. at 371-72.

VII.

THE DISTRICT COURT'S JURISDICTION IS NOT SUBJECT TO COLLATERAL ATTACK

Nor should this Court consider a challenge of the District court's jurisdiction. A court's determination of its own jurisdiction is subject to the principles of res judicata; it generally may not be challenged in a collateral proceeding. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099, 2104 n. 9, 72 L.Ed.2d 492 (1982); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 319, 84 L.Ed. 329 (1940). "A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment." Id. It has long been the rule

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that principles of res judicata apply to jurisdictional determinations-both subject matter and personal. Id; see also, Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938).

A federal court possesses broad authority to issue various ancillary relief measures in enforcing actions brought by federal agencies. FTC v. Productive Marketing, Inc., 136 F. Supp. 2d 1096, 1104 (C.D. Cal. 2001); see also SEC vs. Universal Fin., 760 F.2d 1034, 1038 (9th Cir. 1985) (finding that a district court's power to enter a blanket receivership stay is broader than a district court's authority to grant injunctive relief under Federal Rule 65); SEC vs. Wencke, 622 F.2d 1363, 1371 (9th Cir. 1980) ("The Supreme Court has repeatedly emphasized the broad equitable powers of the federal courts to shape equitable remedies to the necessities of particular cases, especially where a federal agency seeks enforcement in the public interest.").

A receivership order issued to preserve the assets of a receivership estate is a classic example of a district court's exercise of in rem jurisdiction over receivership property. Productive Marketing, Inc., 136 F. Supp. 2d at 1105; see also Wencke, 622 F.2d at 1369 (stating that a federal district court's power to issue a stay against all persons concerning all proceedings against the receivership entities "rests as much on its control over the property placed in receivership as on its jurisdiction over the parties to the securities fraud action"); United States vs. Hall, 472 F.2d 261, 267-68 (5th Cir. 1972) (finding that federal district courts have inherent authority to enforce their orders against non-parties given the concept of in rem jurisdiction); SEC vs. Elfindepan, S.A., No. 1:00CV00742, 2002 WL 31165146, at *4 (M.D.N.C. 2002) (finding that federal district courts have jurisdiction to decide the legitimacy of ownership of claims made by non-parties to assets alleged to be proceeds from securities laws violations); SEC vs. Pinez, 989 F. Supp. 325, 337 (D. Mass. 1997) ("Courts also have jurisdiction to decide the legitimacy of ownership claims made by non-parties to assets alleged to be proceeds from securities laws violations.").

Indeed, the purpose of a federal district court's in rem jurisdiction over receivership property through a temporary restraining order or preliminary injunction (or similar injunctive-order) is to preserve the assets resulting from the actions of the receivership defendants, whether held by parties or non-parties, in order to provide redress for legitimately-defrauded investors. Productive Marketing, Inc., 136 F. Supp. 2d at 1105-1106.

Integretel is seeking to frustrate that goal, which would undermine the very purpose of a federal equity receivership, and make any receiver's attempt to recover receivership property for the benefit of defrauded victims too costly and time-consuming to pursue. Productive Marketing is instructive on this very issue. In that case the non-party, ACCPC, refused to relinquish assets located in reserve accounts, relying instead on a contract it signed before the receivership which required a hold-back of the reserve funds for a minimum amount of time. Id. at 1106, 1009. The district court, however, found that ACCPC's reliance on the contract was misplaced, because its failure to turn over the funds disrupted the district court's power to enforce its receivership injunction:

> If the court cannot compel ACCPC to turn over assets in its possession belonging to the receivership estate, the Receiver will be unable to provide adequate redress to consumers who have been defrauded by Defendants. Because ACCPC's conduct imperils the court's ability to render an effective judgment, the court may properly enjoin it, even though it is not a party to the action.

Id. at 1106.

Citibank, N.A. v. Nyland, (CF8) Ltd., 839 F.2d 93 (2d Cir. 1987), is also instructive on this issue. In Nyland, the Second Circuit held:

> Second, we believe that the receiver's fiduciary responsibilities to preserve the property during the course of the underlying litigation concerning the ownership of the property must be seen as superior to New York Land's contractual interest, if any, in the property. As receiver, Cushman & Wakefield is acting as an officer of the court and has the duty to preserve and protect the property pending the outcome of the litigation. As a result, its authority is wholly determined by the order of the appointing court. . . . [R]eceivers are not bound by contracts of the entity that they are appointed to protect. A receiver becomes bound only when it affirmatively adopts the obligations of the entity that it is protecting. . . . [W]e find that New York Land's management and leasing services contract is subordinate to Cushman & Wakefield's obligation to preserve the premises.
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> Id. at 98 (emphasis added; citations omitted).

In this case, the District Court has determined pre-bankruptcy that the Subject Funds are property of the Receivership, and has exercised its in rem jurisdiction over that property. The District Court has further entered an order after the commencement of this Bankruptcy Case iterating that the Subject Funds are Receivership property, and holding that the automatic stay does not bar its recovery or interfere with the District Court's exclusive subject matter jurisdiction over

the Subject Funds. As in Eller Industries, the Debtor is attempting to interfere with the administration of the Receivership, first, by filing the Cash Collateral Motion, which attempts to use Receivership property to fund its business operations, and second, by filing an adversary proceeding seeking to enjoin the Federal Receiver from enforcing the pre-bankruptcy turnover and contempt Orders. As the above authorities demonstrate, any attempt to challenge the exclusive subject matter jurisdiction of the District Court Receivership over the Subject Funds must be brought in the District Court or in the Eleventh Circuit, not in a collateral proceeding, whether in this Bankruptcy Court or any other court.

In fact, the Debtor has sought to stay enforcement of the September 14, 2007 Order, which relief was granted by the District Court on September 26, 2007, conditioned upon the Debtor's turning over the Subject Funds to the Federal Receiver for segregation pending appeal. See Exhibit "R" to Receiver's Third Request for Judicial Notice. The Clarification Order is a clear indication that the District Court intends to continue to exercise its in rem jurisdiction over the Subject Funds and to enforce the execution of the contempt Orders.[2] The Debtor is asking nothing less than for this Bankruptcy Court to reverse the District Court's Orders and ignore the integrity of the District Court in its exercise of its exclusive subject matter jurisdiction over property of the Receivership.

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[2] Had the issue of whether the Subject Funds are Receivership property not already been determined, the Debtor would nonetheless be asking this Bankruptcy Court to ignore longstanding principles of comity within courts with concurrent jurisdiction, which hold that it is appropriate for the first court dealing with a particular issue to decide the issue. Cisneros v. Cost Control Marketing and Sales, 862 F.Supp. 1531W.D.Va.,1994 (citing Smith v. McInver, 22 U.S. (9 Wheat) 532, 535, 6 L.Ed. 152 (1824) ("[I]n all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it."); United States Fire Ins. Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487, 488 (8th Cir.1990); EEOC v. University of Pa., 850 F.2d 969, 972 (3d Cir.1988) [citing Kline v. Burke Constr. Co., 260 U.S. 226, 229, 43 S.Ct. 79, 81, 67 L.Ed. 226 (1922)]. This is a non-issue, since the District Court has already ruled that the Subject Funds are the Receiverships' property.

VIII.

RE-LITIGATION OF THE PARTIES' DISPUTES OVER THE SUBJECT FUNDS ARE BARRED BY RES JUDICATA

The doctrine of res judicata also applies here. See, Baldwin v. Iowa State Traveling Men's Ass'n, 51 S.Ct. 517, 517, 283 U.S. 522, 524, 75 L.Ed. 1244 (1931). The doctrine of *res judicata* "ensures the finality of decisions." Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979). It serves to protect adversaries from the expense and vexation attending multiple lawsuits, to conserve judicial resources, and to foster reliance on judicial action by minimizing the possibility of inconsistent decisions. Montana v. United States, 440 U.S. 147, 153-54, 99 S.Ct. 970, 973-74, 59 L.Ed.2d 210 (1979). The doctrine applies to jurisdictional issues as well as substantive issues. See Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963); Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938); Yanow v. Weyerhauser Steamship Co., 274 F.2d 274, 277 (9th Cir.1959); Title v. United States, 263 F.2d 28, 30 (9th Cir.1959).

The Ninth Court in Americana Fabrics, Inc. v. L & L Textiles, Inc. 754 F.2d 1524 (9th Cir. 1985) explains the doctrine of *res judicata* as follows:

> Res judicata encompasses two subsidiary doctrines, claim preclusion and issue preclusion. Under claim preclusion, a final judgment on the merits of a claim bars subsequent litigation of that claim. Claim preclusion "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Brown v. Felsen, 442 U.S. at 131, 99 S.Ct. at 2209; see Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 750 F.2d 731, 737 (9th Cir.1984). The related doctrine of issue preclusion, or collateral estoppel, bars relitigation, even in an action on a different claim, of all "issues of fact or law that were actually litigated and necessarily decided" in the prior proceeding. Segal v. American Tel. & Tel. Co., 606 F.2d 842, 845 (9th Cir.1979); see Montana v. United States, 440 U.S. at 153, 99 S.Ct. at 973.

Res Judicata similarly applies to judgments that are on appeal. "Even if the first judgment ultimately is reversed, this does not automatically mean nullification of the judgment in a second action in which the first judgment was given preclusive effect." Reed v. Allen, 52 S.Ct. 532, 286 U.S. 191, 76 L.Ed. 1054 (1932).

Here, certain critical issues, issues which the Debtor has asserted in these proceedings, were already litigated before the District Court, they were decided against the Debtor, and these decisions are part of the District Court Orders. In particular, the Debtor already argued before the District Court that the subject funds arise from a contract claim and the Federal Receiver is merely an unsecured creditor.[3]

The Omnibus Order rejected this argument. On page 22 of the Response, Debtor argued that a full blown trial was required. This was also rejected in the Omnibus Order.

The District Court made explicit and unambiguous, findings of fact in its Omnibus Order, including:

- Integretel had agreements in place with the Receiverships that permitted them to hold the Receiverships' money as reserves (pages 1-2).
- Integretel did not advise either the Federal Receiver or the FTC that it was holding reserves. Rather, its president informed the FTC on March 6, 2006 that no amounts are currently due and owing to Access One or Network One. (page 2)
- The reserve amount being held by Integretel (and/or its affiliates) is $1,762,762.56. (page 2).

The District Court also made the explicit and unambiguous, conclusions of law in its Omnibus Order disposing of other issues here, including:

- Integretel's keeping the reserves in a pooled account "is a distinction without a difference, since the TRO captures funds held on behalf of, or for the benefit of, a Defendant." (page 3).
- The agreements did not give the Debtor the right to use the reserves to fund the indemnity, or any violations of the Federal Trade Commission Act (pages 3-4).

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[3] This is clear from p. 59 of Debtor's Response in Opposition to the Receiver's Motion for an Order to Show Cause (the Response), attached as Exhibit "S" to the Third Request for Judicial Notice and authenticated by the Declaration of David Chase filed in the Federal Receiver's Opposition to the Motion for Summary Judgment.

- The Federal Receiver's claim is not a claim at law governed by pre-receivership contracts, but one governed by this Court's jurisdiction over receivership property. (page 4).
- Issues concerning entitlement to disputed receivership property can be determined via summary proceedings in the federal court equity receivership context. (page 5).

Indeed, just days after issuing the Omnibus Order, and after the Debtor filed its bankruptcy petition, the District Court issued its September 21, 2007 Order Granting Motion for Clarification as to Scope of Stay. In the District Court's September 21, 2007 Clarification Order, the District Court also set forth findings of fact and conclusions of law, including:

- The Court has already ruled that the reserve funds are the property of the receivership estate and ordered Integretel to pay the current reserve funds, amounting to $1,762,762.56, immediately to the Federal Receiver. (page 1).
- The contempt proceeding is not stayed by the bankruptcy, since the reserve funds are not property of the bankruptcy estate, and the contempt proceedings are excluded from the automatic stay pursuant to 11 U.S.C. § 362(b)(4) (page 4).

In addition, a review of the District Court's Orders reveals that this was no interim measure to preserve the subject funds for safekeeping, rather, it was an adjudication of ownership of the subject funds. The ownership issue is not predicated on whether the FTC ultimately prevails in the enforcement action against the Debtor. Consequently, the turnover provisions of the Omnibus Order and Clarifying Order are final, appealable orders. See SEC v. Wencke, 783 F.2d 829, 837-38 (9th Cir. 1986) (stating that claims of non-parties to property claimed by receivers can be resolved via summary proceedings, which reduce the time necessary to settle disputes, decrease litigation costs and prevent dissipation of receivership assets, as long as there is notice to the non-party and an opportunity to be heard, and thus satisfy due process); see also, CFTC v. Topworth Int'l, Ltd., 205 F.3d 1107, 1111-12 (9th Cir. 2000) (finding that turnover order stating that $300,000 belonged to one party, and not another, was final, appealable order because order disposed of ownership rights in property). Accordingly, the Debtor's arguments that this

Bankruptcy Court should exercise jurisdiction over and litigate the "dispute" over whether the subject funds are property of the Receiverships are barred by Res Judicata.

IX.

THE DEBTOR MISCONSTRUES THE FEDERAL RECEIVER'S OWNERSHIP INTEREST AS A TRUST

The Debtor is attempting to mislabel and limit the Federal Receiver's property right as a claim for a constructive trust in order to hide behind tracing requirement and to provide a reason for this Court to re-litigate the issues already adjudicated in the District Court. At present, the Federal Receiver is not seeking nor has it sought the imposition of a trust over the subject funds. Rather, the Federal Receiver sought turnover of property of the Receivership and contempt for violation of the Temporary Restraining Order and Preliminary Injunctions entered by the District Court on the motion of the FTC. The equitable relief sought and obtained by the Federal Receiver was pursuant to Court order.[4] Simply labeling the Receiver's rights as a "trust" ignores the broad authority of the District Court to establish equitable remedies in order to preserve assets of the Receivership estates. See, Wencke, 622 F. 2d at 1371 ("The Supreme Court has repeatedly emphasized the broad equitable powers of the federal courts to shape equitable remedies to the necessities of particular cases, especially where a federal agency seeks enforcement in the public interest"); see also, FTC v. Productive Marketing, Inc., 136 F. Supp. 2d 1096, 1105 (C.D. Cal. 2001) ("An order issued to preserve the assets of a receivership estate is a classic example of an *in rem* injunction").

The Debtor's "trust" argument was already considered and rejected by the District Court, as is demonstrated by the Omnibus Order. The Debtor argued there, as it does here, that "'the reserves do not take the form of any actual funds that [the Debtor] has segregated or otherwise set aside...'

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[4] The District Court's jurisdiction over this issue is also authorized by Federal Statute. See, 15 U.S.C. § 53(b); F.T.C. v. Southwest Sunsites, Inc., 665 F. 2d 711 (5th Cir. 1982) cert den. 102 S. Ct. 2236, 456 U.S. 973, 72 L.Ed.2d 846 (Grant of jurisdiction under this section carries with it the authorization for the district court to exercise a full range of equitable remedies traditionally available to it)

and maintains that it keeps the reserves in a pooled account it tracks via an internal accounting entry." September 14, 2007 Order, p. 3. The District Court ruled that such distinction was without consequence, "since the TRO captures funds 'held on behalf of, or for the benefit of, a Defendant.'" September 14, 2007 Order, page 3.

The Debtor keeps pointing to the underlying contracts and stating that it had no obligation to segregate the deposits, as if this point will absolve it of its requirement to turn over the deposits pursuant to the TRO.[5] As acknowledged by the District Court, "the Receiver's claim is not a claim at law governed by pre-receivership contracts, however, but one governed by [the District] Court's jurisdiction over receivership property based on the TRO and Amended Preliminary Injunction." September 14, 2007 Order, page 4. Accordingly, it is of no consequence whether the contract required the Debtor to segregate the Subject Funds. The equitable relief sought and obtained by the Federal Receiver in District Court was pursuant to Federal Statute and not based upon the much narrower equitable remedy of constructive or express trusts.

X.

EVEN IF CONSTRUED TO BE TRUST, THE RECEIVER'S CLAIM WAS ESTABLISHED PRE-PETITION AND THE SUBJECT FUNDS ARE THEREFORE EXCLUDED FROM THE BANKRUPTCY ESTATE

In its reply brief, the Debtor cites In re Advent Management Corp., 178 B.R. 480, 491 (9th Cir. BAP 1995) for the proposition that a party seeking to establish a trust over commingled funds must trace those funds. That case is distinguishable from ours, since in Advent, the creditor seeking to establish a constructive trust had not obtained a judgment pre-petition and therefore its claim was inchoate. Id. at 488; cf., Airwork Corp v. Markair Express, Inc. (In re Markair, Inc.),

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[5] In fact, the Debtor was required under contract to maintain separate accounts for each client. The contracts are attached as Exhibit "2" and "3" to the Receiver's Revised Motion for an Order to Show Cause, which itself is attached to the Chase Declaration as Exhibit "F." In the section marked "Definitions", "Account" is defined as "A separate account of Client under which Billing Transactions and settlement funds are tracked and reported."

172 B.R. 638, 642 (9th Cir. BAP 1994) ("A constructive trust imposed by state law pre-petition would therefore exclude the res from the debtor estate.")[6]

As argued *supra*, the Federal Receiver was acting under Federal law when it sought and obtained an order determining that the Subject Funds were property of the Receivership and requiring its turnover under penalty of contempt. The Federal Receiver was not acting under the color of common law equitable trusts. Nonetheless, the Federal Receiver already obtained its equitable remedy pre-petition. The District Court rejected any argument that the commingling of the deposits with other estate assets rendered the Federal Receiver unable to capture the Subject Funds pursuant to the Federal injunctions. To the extent that the Debtor contends that tracing was necessary, it is free to argue the same in the Eleventh Circuit where this matter is currently on appeal.

XI.

CONCLUSION

For the reasons stated above, the Receiver requests that the Debtor's Motion for a Preliminary Injunction be denied. This Court is also respectfully requested to order immediate turnover of the Subject Funds.

Dated: October 15, 2007

DANNING, GILL, DIAMOND & KOLLITZ, LLP

By: _____

STEVEN J. SCHWARTZ
Attorneys for David R. Chase, Court-Appointed Receiver of Access One Communications, Inc., and Network One Services, Inc.

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[6] Moreover, under Florida law, "when a person who is subject to a trust claim commingles the trust funds with funds of his own, and funds are subsequently dissipated, he is presumed to first dissipate his own funds rather than funds held in trust, such that the funds remaining in an account are presumed to be those held in trust". In re Hecker, 316 B.R. 375, 377 (Bankr. S.D. Fla. 2004). Therefore, even if viewed as a constructive trust, the Debtor's commingling of the reserves would be of no consequence.